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Managing the External Effects of Devolved Legislation: Virtual Representation, Self-Rule and the UK's Territorial Constitution

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ABSTRACT – L'intervento confronta la sez. 35 dello Scotland Act e la sez. 101 del Government of Wales Act con un altro importante atto normativo che impatta sulla devolution: lo United Kingdom Internal Market Act del 2020.

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di *Thomas Horsley**

The Scottish Government is presently seeking judicial review of the UK Government's decision to block Royal Assent for the Gender Recognition Reform (Scotland) Bill (GRRB) using s.35 of the Scotland Act 1998 (SA). The Court of Session's decision, which may yet end up before the UK Supreme Court on appeal, is eagerly awaited, not least given the electricity of political debates over gender recognition and its reform in Scotland and elsewhere.

This post explores parallels between s.35 of the Scotland Act (and, by extension, s.101 Government of Wales Act 2006 (GOWA)) and the operation of another major piece of legislation affecting devolution: the United Kingdom Internal Market Act 2020 (UKIMA). At first glance, there is perhaps little obvious connection between the two instruments. S.35 SA establishes, for the UK Government, an extraordinary power to block Scottish Bills from receiving Royal Assent in particular instances; the UKIMA regulates the movement of in-scope goods and services between the four nations of the UK post-Brexit. Functionally, however, there is a common thread. Both s.35 and the UKIMA may be viewed as attempts to address a shared problem arising under the UK's territorial constitution: how to manage the external (here: intra-UK) effects of devolved policymaking. As discussions over gender recognition reform and intra-UK trade post-Brexit evidence, the challenge of managing the external effects of devolved policymaking remains a central test for (and of) the UK constitution.

This post begins by examining the competence-based treatment of external effects under s.35 SA and the UKIMA respectively. Thereafter, it expands

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discussion of the external effects of devolved policymaking with reference to two normative theories: virtual representation and democratic self-rule. Finally, it concludes with a call encouraging further reflection on the extent to which competing demands under these two theories are effectively balanced through existing institutional structures.

External Effects of Devolved Legislation

To develop the underlying functional parallel, let us consider, first, the two sets of instruments side-by-side. On the one hand, s.35 SA [specifically: s.35(1)(b)] provides a mechanism to block the exercise of devolved competences on the grounds of their 'adverse effects on the operation of the law' as it applies to reserved matters. S.101 GOWA is more specific on external (intra-UK) effects, relating these exclusively to the application of the law 'in England.' On the other hand, the UKIMA seeks to manage the external effects of devolved policymaking to protect intra-UK trade. Its market access principles (mutual recognition and non-discrimination) guarantee access for in-scope goods and services to the four markets of the UK.

The two instruments align the scrutiny of external effects with competence, albeit in different ways. Under s.35(1)(b) SA, the notion of 'adverse effects on the operation of law' is expressly tied to reserved competences. Accordingly, the external effects of devolved legislation only become 'adverse' in instances where they may be shown to impact on matters which are reserved to the Westminster Parliament. Contrastingly, the UKIMA makes no direct reference to reserved competences with respect to the application of its market access principles. Instead, the reservation of competences follows indirectly from the UK Parliament's decision to add the Act (including its market access principles) to the list of protected enactments which the devolved legislatures may not modify, including when legislating on matters which are devolved to them. At the same time, however, in comparison with s.35(1)(b) SA, the UKIMA more clearly delineates, in substantive terms, the external effects of devolved legislation that, adopting the language of s.35(1)(b) SA, it determines 'adverse.' Its market access principles target devolved measures that establish new barriers to intra-UK trade for in-scope goods and services post-Brexit.

In relation to the GRRB, the UK Government identifies a range of effects on the operation of the law that it qualifies as 'adverse.' A first set of adverse effects is said to arise as a result of the Bill's creation of a dual system for gender recognition within the UK, with differences in legal status introduced between Scots law and the Law of England and Wales; a second set draws attention to the alleged impact of the Bill on existing safeguarding measures, with projections about an increase in the risk of fraudulent applications; finally, a third set of reasons claims that the GRRB will exacerbate existing tensions with respect to the application of the Equality Act 2010 (the Equality Act) and introduce new

problems. A UK Government Policy Paper¹ provides further detail on all three points.

Following the wording of s.35(1)(b) SA, the identification of alleged adverse effects is explicitly tied to discussion of reserved competences. Primarily, the UK Government argues that the changes the Bill introduces to the Gender Recognition Act 2004 (the 2004 Act) would modify the law on equal opportunities, which is a reserved matter under Schedule 5 of the SA. It does so, the UK Government maintains, through the 2004 Act's particular 'inter-relationship' with the Equality Act as the cornerstone of Great Britain's legal framework on equality rights and equal opportunity (with limited exceptions, the Act does not apply in Northern Ireland). A full Gender Recognition Certificate (GRC) issued under the 2004 Act has the effect of changing an individual's sex for the purposes of applying the Equality Act's determinations on sex as a protected characteristic. By changing the law (in Scotland) governing the acquisition of a full GRC through its modification of the 2004 Act, the GRRB is said to engage equal opportunities as a reserved matter through its effects on the operation of the Equality Act's provisions on sex as a protected characteristic.

Why scrutinise the external effects of devolved legislation?

S.35(1)(b) SA and the UKIMA link discussion of the external (intra-UK) effects of devolved policymaking with questions of competence. That is unsurprising given the competence-based structures of devolution under the UK constitution. Scrutinising the external territorial effects of government policymaking is, however, much more than simply a question of legal competence, including within systems of devolved government. It engages discussion of a broader range of externalities; for example, environmental effects (eg pollution displacement), impacts on cross-border investment and trade flows (eg competitive distortions) and regulatory hegemony (see eg Bradford on the 'Brussels Effect'² in relation to EU policymaking). Expanding horizons, this post introduces two conceptual dynamics relevant to analysing the external effects of devolved policymaking: virtual representation and democratic self-rule.

Virtual representation speaks to considerations of political representation. Virtual representation theories emphasise the important role that checks on external effects play in integrating 'out-of-state' (and, thus, otherwise non-represented) political interests within internal policymaking processes (eg Poiares Maduro, 1998³; Regan, 2001⁴). Monitoring the 'spill over' effects of

¹ https://theuniversityofliverpool-my.sharepoint.com/personal/thomash_liverpool_ac_uk/Documents/Work/Research/UKICE%20Project/UKIMA%20articles/GRRB/s35%20UKG%20statement%20%20-%20GOV.UK.pdf

² <https://global.oup.com/academic/product/the-brussels-effect-9780190088583?cc=gb&lang=en&>

³ <https://www.bloomsbury.com/uk/we-the-court-9781847310866/>

⁴ <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1338&context=articles>

policies within systems recognising distinct tiers of government provides an opportunity not only to scrutinise competence, but moreover to ensure that, when exercising their respective competences, governments take due account of external interests. In relation to the GRRB specifically, giving effect to virtual representation would support arguments in favour of encouraging the Scottish Government expressly to consider the impact of proposed changes on intersecting UK policy frameworks; for example, those governing equality, employment and social security law. Whilst it is not within the competence of the Scottish Parliament to legislate to determine the legal effects of changes to gender recognition in any jurisdiction other than Scotland⁵ (or to legislate on reserved matters), the Scotland Act places no bar on its careful scoping and accommodation of external interests when determining how to exercise its devolved competences to legislate in relation to Scotland.

Similarly, virtual representation may also be engaged to theorise the operation of the newly-reconstituted UK internal market. Viewed through that lens, the UKIMA market access principles perform an important representative function. They work to integrate the interests of producers and services providers operating outside the jurisdiction of the relevant regulating devolved administration (eg of Welsh producers operating in Scotland, or English service providers in Scotland etc). The relevant interests here relate to free trade. The market access principles (and mutual recognition, in particular) guarantee, for producers and services providers operating lawfully within one of the four nations, a right to trade throughout the entire UK, subject only to limited exceptions and special rules governing Northern Ireland. The political interests of 'out-of-state' economic actors are integrated into internal political processes in a particularly forceful and uncompromising manner. The UKIMA mandates that the devolved governments not only consider, but in fact give full internal legal effect by default to the regulatory choices of other governments with respect to in-scope goods and services. This is normative theory applied in the extreme, but an instance of virtual representation nonetheless.

Arguments in favour of integrating out-of-state interests into internal policymaking processes are matched, of course, by equally strong claims regarding the political implications of doing so. Viewed from Cardiff and Edinburgh (and, with greater complexity, Belfast), devolution is increasingly conceptualised as an expression of democratic self-rule (eg McEwen, 2022⁶). As such, it characterises a process that generates its own legitimacy and accountability dynamics – dynamics that demand external constitutional respect, notably at Westminster. Appeals for the devolved administrations to give effect to, or even just consider external interests when exercising their competences in devolved areas are easily construed, by the devolved governments, as a direct

⁵ <https://www.legislation.gov.uk/ukpga/1998/46/section/29>

⁶ <https://www.routledge.com/Defensive-Federalism-Protecting-Territorial-Minorities-from-the-Tyranny/Requejo-Sanjaume-Calvet/p/book/9781032281964>

threat to the very essence of democratic self-rule. The Scottish Government's public response to the UK Government's decision to activate s.35 SA in relation to GRRB speaks directly to this. Reacting to the s.35 notification, the responsible Scottish Minister denounced, in the language of self-rule, the UK Government's intervention as directly undermining Scottish democracy.

In Search of Balance

To what extent does the UK constitution effectively manage the external effects of devolved policymaking in a manner that acknowledges the logic of virtual representation whilst respecting democratic self-rule? The remainder of this post cannot, of course, address this question in exhaustive detail. The aim here is to encourage further descriptive (and normative) reflection on how the UK constitution manages the external effects of devolved policymaking with reference to considerations other than (primarily) legal competence.

In that spirit, we may note that existing statutory frameworks do little to support effective balancing. S.35 SA, for example, is a rather blunt instrument that enables the UK Government to block Acts of the Scottish Parliament from receiving Royal Assent after they complete their third reading. There is no statutory obligation for the UK Government to engage with Holyrood (or, analogously, with the Senedd under s.101 GOWA) prior to exercising that power. Indeed, the Scottish Government claims that Westminster did not reach out at any point during the GRRB's enactment to voice its concerns about the Bill's alleged adverse external effects on UK legislative frameworks.

The UKIMA is similarly heavy-handed, albeit in a different sense. As noted already, that Act imposes an obligation on the devolved governments to give effect to 'out-of-state' interests by default through its application of the market access principles to in-scope goods and services. Whilst this may operate to strengthen virtual representation (as argued above), it presents a fundamental challenge to the dynamics of democratic self-rule. The fact that the UKIMA was enacted without the consent of the Scottish and Welsh Parliaments further undermined devolution as an institutional embodiment of democratic self-rule.

Internal legislative processes are also not ideally calibrated to the task of considering the external effects of devolved policymaking in the above terms. The consideration of such effects is not formally mandated. As such, it will generally feature only to the extent that external effects intersect with issues of legislative competence (as with the GRRB) and/or gain traction in preparatory reports and Committee or Plenary debates. The Scottish Parliament's Standing Orders (Rule 9.3) formally require only the following documents to accompany the introduction of a legislative Bill: an explanatory note; a policy memorandum; a financial memorandum; a delegated powers memorandum; and a statement on legislative competence (for Wales, see Rule 26). Impact assessments too tend to

centre on analysing (and justifying) internal regulatory costs for government, business and other stakeholders.

Intergovernmental (IGR) frameworks offer far greater scope to raise, discuss and, if appropriate, address the external effects of devolved policymaking in a manner that acknowledges virtual representation whilst simultaneously respecting the dynamics of democratic self-rule. The UK's IGR framework is the glue that holds together relationships between the devolved and UK governments. Despite recent reform⁷, however, IGR in the United Kingdom remains fragile, with its effectiveness still determined to a great extent by the quality of relationships between political actors. Regrettably, here things remain under considerable strain.

Among IGR structures, the Common Frameworks Programme⁸ stands out as perhaps the strongest (implicit) attempt thus far to manage the external effects of devolved policymaking in a manner that acknowledges the logic of virtual representation whilst respecting democratic self-rule. Established by Joint Agreement of the UK and Devolved Governments⁹ in 2017, the Programme is designed to coordinate the exercise of devolved competences in areas previously regulated by EU law. The Programme is imperfect and embryonic, but evidences principles and practices that demonstrate clear promise. At the time of writing, the UK and devolved governments have reached provisional political agreement on coordinating the exercise of their respective competences in 28 policy areas from animal health and welfare¹⁰ and motor insurance¹¹ to public procurement¹² and blood safety and quality¹³.

In contrast to the UKIMA, the Common Frameworks rest on political buy-in from all four governments. Whilst thin on the substantive principles that govern the UK internal market (and also subordinate to the market access principles), the Frameworks do provide an important forum for considering the external effects of devolved policies, notably on producers and service providers operating in other UK markets. They also establish a space for the devolved

⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1046083/The_Review_of_Intergovernmental_Relations.pdf

⁸[https://www.gov.uk/government/collections/uk-common-frameworks#uk-common-frameworks-\(provisional\)](https://www.gov.uk/government/collections/uk-common-frameworks#uk-common-frameworks-(provisional))

⁹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652285/Joint_Ministerial_Committee_communique.pdf

¹⁰<https://www.gov.uk/government/publications/animal-health-and-welfare-provisional-common-framework>

¹¹<https://www.gov.uk/government/publications/motor-insurance-provisional-common-framework>

¹²<https://www.gov.uk/government/publications/public-procurement-provisional-common-framework>

¹³<https://www.gov.uk/government/publications/the-blood-safety-and-quality-provisional-common-framework-command-paper>

governments (and UK Government legislating for England) to give notice of their respective legislative ambitions with a view to policy coordination, or, if not desirable, securing agreement on parameters for divergence. A robust early warning system enabling the four governments to keep each other informed of their respective legislative agendas is an essential component of the balancing toolkit. Should the UK and devolved governments ultimately reach agreement on policy coordination and/or divergence in specific areas, ss.10(3) and 18(3) UKIMA, empower the UK Government to exempt 'Common Framework Agreements' from the application of the market access principles – a procedure that has been activated, for example, in relation to single-use plastics. Finally, with respect to the dynamics of self-rule, the Common Frameworks Programme poses a lesser threat for the devolved administrations. The Frameworks aspire to manage the exercise of devolved competences affecting intra-UK trade preemptively through information-sharing and by consensus. This is the very antithesis of the approach we see under UKIMA with regard to the market access principles, ss.10(3) and 18(3) UKIMA.

Next Steps

The Common Frameworks are not presented here as a perfect template for institutional reform. For one thing, the Frameworks are vulnerable to criticism as tools furthering executive power under the UK constitution. Nonetheless, the Frameworks remain distinguishable as instruments with the potential, in suitably modified form, to address the underlying challenge theorised in this post. Regardless of what the Court of Session (or, thereafter, UK Supreme Court) ultimately rules in relation to s.35 and the GRRB, there is a need for further, detailed reflection on how the UK constitution manages the external effects of devolved policymaking. As this post has argued, the challenges here extend beyond considerations of legislative competence. Exercising devolved competences involves more than determining the limits for policy experimentation and innovation with reference to statutory frameworks circumscribing devolved legislative competences. It engages broader considerations including virtual representation and democratic self-rule that require careful balancing to ensure the stability of the UK's territorial constitution. IGR structures are a key part of the solution, with the principles and spirit underlying the Common Frameworks Programme offering a particularly instructive model for future institutional reform.